BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Louisiana's intentional segregation of voters by race in redistricting is subject to strict scrutiny.

2. Whether (1) Louisiana's mistaken belief that federal law required segregated congressional districts, or (2) an amorphous invocation of past discrimination, can serve as a compelling interest justifying such districts.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
A. Appellees' Challenge to Louisiana's Redistricting Plans	2
B. Act 1 Replaces Act 42	6
C. The Court's Findings That Act 1 Constitutes an Unconstitutional Racial Gerrymander	8
D. Louisiana's Failure to Provide a Compelling State Interest	11
SUMMARY OF ARGUMENT	13
ARGUMENT	16
I. ACT 1 IS SUBJECT TO STRICT SCRUTINY	17
A. Where Race Is a "Motivating Factor," State Action Must be Subjected to Strict Scrutiny Unless the Same Result Would Have Obtained Without Regard to Racial Considerations	18
B. The District Court Properly Determined That Act 1 Triggered Strict Scrutiny	26
1. Plaintiffs Established A *Prima Facie* Case That Racial Considerations Were The "Motivating Factor" Behind Act 1	28
2. Appellants Failed to Rebut Plaintiffs' *Prima Facie* Case	30

II. ACT 1 CANNOT SURVIVE STRICT SCRUTINY 34

A. A Mistaken Belief That Act 1 Was Compelled By The Voting Rights Act Is Not a Compelling State Interest 35

B. Act 1 Was Not Compelled By the Voting Rights Act 39

1. Act 1 Was Not Compelled By Section 5 of the Voting Rights Act. 39

2. Act 1 Was Not Compelled By Section 2 of the Voting Rights Act 44

C. Act 1 Cannot Be Justified By A Perceived Need To Remedy Historical Inequity 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 43
Allen v. State Bd. of Election,
393 U.S. 544 (1969) 41, 42
American Surety Co. v. Sullivan,
7 F.2d 605 (2d Cir. 1925) 38
Anderson v. Martin,
206 F. Supp. 700 (D. La. 1962),
rev'd 375 U.S. 399 (1964) 1, 22
Barlow v. United States,
32 U.S. (7 Pet.) 404 (1833) 37
Batson v. Kentucky,
476 U.S. 79 (1986) 25
Beer v. United States,
425 U.S. 130 (1975) 43
Browder v. United States,
312 U.S. 335 (1941) 38
Brown v. Board of Education,
347 U.S. 483 (1954) 17, 18
Cheek v. United States,
498 U.S. 192 (1991) 37
Chisom v. Roemer,
501 U.S. 380 (1991) 43
City of Pleasant Grove v. United States,
479 U.S. 462 (1987) 43
City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 12, 19, 26, 46
City of Rome v. United States,
446 U.S. 156 (1980) 42, 43
Colorado v. Connelly,
479 U.S. 157 (1986) 40

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 44
Crandon v. United States,
494 U.S. 152 (1990) 43
Cunico v. Pueblo School District,
917 F.2d 431 (10th Cir.1990) 38
Davis v. Bandemer,
478 U.S. 109 (1986) 23, 50
DeBartolo v. Florida Gulf Coast Bldg. and Constr. Trades Council,
485 U.S. 568 (1988) 36, 40
Doe v. Small,
964 F.2d 611 (7th Cir. 1992) (*en banc*) 38
Dorsey v. State Athletic Comm'n,
168 F. Supp. 149 (E.D. La. 1958)
aff'd mem. 359 U.S. 533 (1959) 2
Farmers Educ. & Coop. Union of America v. WDAY, Inc.,
360 U.S. 525 (1959) 40
Fullilove v. Klutznick,
448 U.S. 448 (1980) 34
Gomillion v. *Lightfoot*,
364 U.S. 339 (1960) 19-21, 27, 29
Growe v. Emison,
113 S. Ct. 1075 (1993) 44, 48
Hafer v. Melo,
112 S. Ct. 358 (1991) 38
Hamm v. Virginia Bd. of Elections,
230 F. Supp. 1156 (E.D. Va.),
aff'd mem., 379 U.S. 19 (1964) 18
Heckler v. Mathews,
465 U.S. 728 (1984) 16
Hernandez v. New York,
500 U.S. 352 (1991) 25
Hirabayashi v. United States,
320 U.S. 81 (1943) 19

Holder v. Hall,
114 S. Ct. 2581 43
Hunter v. Underwood,
471 U.S. 222 (1985) 19, 25
International Union v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 40
J.E.B. v. Alabama ex rel. T.B.,
114 S. Ct. 1419 (1994) 16
Johnson v. DeGrandy,
114 S. Ct. 2647 (1994) 34, 43, 50
Johnson v. Miller,
864 F. Supp. 1354 (S.D. Ga. 1994),
prob. juris. noted, 115 S. Ct. 713
(Jan. 6, 1995) ..... *passim*
Johnson v. Transportation Agency,
480 U.S. 616 (1987) 45
Kentucky v. Graham,
473 U.S. 159 (1985) 38
Kiryas Joel Village School District v. Grumet,
114 S. Ct. 2481 (1994) 24, 25
Lambert v. California,
355 U.S. 225 (1957) 37
Loving v. Virginia,
388 U.S. 1 (1967) 18, 19
Lujan v. Defenders of Wildlife,
112 S. Ct. 2130 (1992) 16
Major v. Treen,
574 F. Supp. 325 (E.D. La. 1983) 41
Metro Broadcasting v. FCC,
497 U.S. 547 (1990) 16, 26, 50
Michigan Road Builders Ass'n, Inc. v. Milliken,
834 F.2d 583 (6th Cir. 1987),
aff'd., 489 U.S. 1061 (1989) 35
Murray v. The Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 36

New York v. United States,
No. 94-2219, 1994 WL 744179
(D.D.C. 1994) 43
Nipper v. Smith,
39 F.3d 1494 (11th Cir. 1994) 50
Plessy v. Ferguson,
163 U.S. 537 (1896) 2, 19, 50
Powers v. Ohio,
499 U.S. 400 (1991) 16
Ratzlaf v. United States,
114 S. Ct. 655 (1994) 37
Reynolds v. Sims,
377 U.S. 533 (1964) 17
San Antonio Indep. School Dist. v. Rodriguez,
411 U.S. 1 (1973) 17
Shaw v. Hunt,
861 F. Supp. 408 (E.D.N.C. 1994) 20, 25
Shaw v. Reno,
113 S. Ct. 2816 (1993) ..... *passim*
South Carolina v. Katzenbach,
383 U.S. 301 (1966) 42, 43
Thornburg v. Gingles,
478 U.S. 30 (1986) ..... *passim*
United Jewish Orgs. of Williamsburgh, Inc. v. Carey,
430 U.S. 144 (1977) ..... *passim*
United States v. Board of Comm'rs,
435 U.S. 110 (1978) 42
United States v. Carolene Prod.,
304 U.S. 144 (1938) 17
United States v. Feola,
420 U.S. 671 (1975) 38
United States v. International Minerals & Chem. Corp.,
402 U.S. 558 (1971) 38
United States v. Leon,
468 U.S. 897 (1984) 38

Vera v. Richards,
861 F. Supp. 1304 (S.D. Tex. 1994) 20, 25, 46
Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*,
429 U.S. 252 (1977) ..... *passim*
Voinovich v. Quilter,
113 S. Ct. 1149 (1993) 33, 44
Washington v. Davis,
426 U.S. 229 (1976) 19, 38
Westwego Citizens for Better Gov't v. Westwego,
906 F.2d 1042 (5th Cir. 1990) 46
Whitcomb v. Chavis,
403 U.S. 124 (1971) 22
White v. Regester,
412 U.S. 755 (1973) 22
Widmar v. Vincent,
454 U.S. 263 (1981) 37
Wright v. Rockefeller,
376 U.S. 52 (1964) ..... *passim*
Wygant v. Jackson Bd. of Education,
476 U.S. 267 (1986) 45, 46, 49
Yick Wo v. Hopkins,
118 U.S. 356 (1886) 18

Statutes

The Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*
Section 2, 42 U.S.C. 1973(a) ..... *passim*
Section 5, 42 U.S.C. 1973c ..... *passim*

Miscellaneous

Alexander M. Bickel, *The Morality of Consent* (1975) 14

Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 642 (1941) 37
A. Kull, *The Color-Blind Constitution* (1992) 50
Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993) 46
Abigail M. Therstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987) 42
1 Wharton's Criminal Law and Procedure § 162 37
Williams, Criminal Law: The General Part §§ 52-74 (2d ed. 1961) 37
Official Journal of the House of Representatives of the State of Louisiana 7
Official Journal of the Senate of the State of Louisiana 7
Random House Dictionary of the English Language 419 (2d ed. 1987) 34, 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-558 and 94-627

UNITED STATES,

Appellant,

v.

RAY HAYS, *et al.*,

Appellees.

STATE OF LOUISIANA, *et al.*,

Appellants,

v.

RAY HAYS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

---

BRIEF FOR APPELLEES RAY HAYS, EDWARD ADAMS, SUSAN SHAW SINGLETON AND GARY STOKLEY

"In the eyes of the Constitution, a man is a man. He is not a white man. He is not an Indian. He is not a Negro." *Anderson v. Martin*, 206 F. Supp. 700, 705 (D. La. 1962) (Wisdom, J., dissenting), *rev'd* 375 U.S. 399 (1964). Louisiana violated that principle in *Anderson* by requiring the designation of a candidate's race on the ballot, thus placing the State's "power and prestige behind a policy of racial classification inconsistent with the elective processes." *Id.*

Judge Wisdom condemned that law by invoking the first Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), and noting that "[i]f there is *one area above all others* where the Constitution is color-blind, it is the area of state action with respect to the *ballot and the voting booth*." 206 F. Supp. at 705 (emphasis added).

The Louisiana law at issue here is unconstitutional for the same reason. Because State-sponsored racial classification "is inherently discriminatory and violative of the Equal Protection Clause," *Dorsey v. State Athletic Comm'n*, 168 F. Supp. 149, 151 (E.D. La. 1958) (Wisdom, J.), *aff'd mem.* 359 U.S. 533 (1959), Louisiana's attempt to "sculp[t] voting districts along racial lines" is no more permissible than would be an attempt to divide citizens by race "at schools and lunch counters." *Hays II*, U.S. J.S. App. ("U.S. App.") at 11a-12a. The district court's judgment invalidating Act 1 should therefore be affirmed.

STATEMENT OF THE CASE

Following this Court's decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), the three-judge court below twice invalidated legislation segregating Louisiana's voters by race to achieve two predominantly black congressional districts and five overwhelmingly white ones. Both decisions involved redistricting plans prepared in response to the 1990 census, which reduced Louisiana's congressional delegation from eight to seven seats. The first decision invalidated Act 42, which contained the notorious Z-shaped District 4 (the so-called "Zorro" district), which "[t]he State now concedes . . . was bizarre." *Hays II*, U.S. App. at 3a n.1. The Louisiana legislature responded by passing Act 1, which the district court again invalidated and which is at issue here.

A. Appellees' Challenge to Louisiana's Redistricting Plans.

Appellee Ray Hays grew up in Grambling, Lincoln Parish, site of the historically-black university of the same

name established in 1901. Since childhood, Hays has had many friends in the community associated with Grambling University and in nearby Ruston and surrounding rural areas. Since the early 1970s, he has been more or less continuously involved in grass-roots organizing and campaigning for Democratic Party candidates. As a local party official, he has strived for an integrated electorate, campaigning for both black and white candidates among voters of both races. These efforts greatly benefitted from the original thrust of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973 *et seq.*, which abolished the discriminatory voting practices and procedures that had characterized Louisiana politics during the Jim Crow era.

This litigation began when Hays and a multi-racial group of plaintiffs from Lincoln Parish became concerned that the VRA had devolved into the engine of a divisive racial spoils system. During the 1991 redistricting for the Louisiana legislature and the eight-member Board of Elementary and Secondary Education ("BESE"), the VRA was invoked to maximize the number of majority-minority districts at all levels of state government. In May 1992, "a legislative alliance between the Black and the Republican Caucuses" again implemented a race-based approach to redistricting in response to Louisiana's loss of one seat in the United States House of Representatives. *Hays I*, U.S. App. at 77a n.54. The alliance of forces responsible for Act 42 never denied the controlling role of race; to the contrary, they championed race as the primary *justification* for the plan. *Id.* at 75a-76a.

Opposing Act 42 as a cynical effort at racial engineering, plaintiffs filed suit in June 1992, challenging the plan on constitutional and statutory grounds. *See Hays I*, U.S. App. at 42a. Joining Hays as plaintiffs were Ed Adams, a retired school principal and grandson of the founder of Grambling University; Gary Stokley, a tenured sociology professor at Louisiana Tech University in Ruston and a Democratic Party activist; and Susan Singleton, a working

mother who recently had become involved in Democratic Party politics.

A three-judge panel of Louisiana federal judges, Circuit Judge Jacques L. Wiener, Jr. (from Shreveport), and District Judges John M. Shaw and Donald E. Walter (from Lafayette and Shreveport respectively), convened to hear the case. The court held a two-day evidentiary hearing in August 1992, during which experts and legislators testified on both sides. *Id.* 74a-76a. The court denied plaintiffs' request for a preliminary injunction and allowed the 1992 congressional elections to proceed as planned under Act 42—including the "Zorro" District. *Id.* at 42a. The district court took plaintiffs' case on the merits under advisement until this Court rendered its judgment in *Shaw*, whereupon the court conducted a second two-day hearing in August 1993. On December 28, 1993, the court held that Act 42 was a racial gerrymander invalid under the Fourteenth Amendment. *Hays I*, U.S. App. 39a.

The district court opinion invalidating Act 42 relied principally on *Shaw* and this Court's earlier decisions in *Wright v. Rockefeller*, 376 U.S. 52 (1964), and *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). *See Hays I*, U.S. App. at 48a n.12; 49a n.17; 69a nn.45 & 46. Specifically, the court held that "a legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." *Id.* at 48a.[1]

The court explained that the element of intent essential to a Fourteenth Amendment claim could be proven either circumstantially, as by a district's bizarre shape as in *Shaw*, or "*a fortiori* . . . by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race." *Id.* at 50a. According

---

[1] Emphasis in original here and elsewhere unless otherwise indicated.

to the court, evidence relevant to establishing an unconstitutional racial gerrymander includes: (1) the shape of district boundaries; (2) the extent to which district boundaries reflect established political subdivisions, and the values of compactness and contiguity; (3) the extent to which parishes and cities are split along racial lines; and (4) testimony admitting a specific legislative intent to classify citizens by race. *Id.* at 62a-75a.

The court acknowledged at the outset that "[r]ace will never be literally the only factor" determining district lines. Rather, as the court noted, the proper inquiry is whether race was "important" or a "motivating" factor. *See Hays I*, U.S. App. at 69a-70a & n.46 (citing *Arlington Heights*, 429 U.S. at 265). When assessing whether discriminatory intent exists, the court "as fact finder . . . must determine the credibility of witnesses, weigh the evidence, and choose between [the competing] inferences." *Id.* at 73a.

After nearly four days of evidentiary hearings, the court concluded that the Zorro District in Act 42 was "highly irregular." U.S. App. at 62a. That district, the court found, violated traditional districting principles and split parishes and cities along self-evidently racial lines. *Id.* at 63a-66a. Testimony by witnesses from both sides, moreover, left "absolutely no doubt that the immediate *intent* of the Legislature as a whole was to enact a plan containing two black majority districts, essentially without regard to any other considerations and interests." *Id.* at 77a. The court thus concluded that "the facts and inferences overwhelmingly favor the Plaintiffs," and that Act 42 "is undeniably a child of racial gerrymandering." *Id.* at 73a.

The court then proceeded to reject Louisiana's argument that Act 42 was narrowly tailored to comply with the Voting Rights Act. Having found that "[n]o one could claim that District 4 is compact, at least not with a straight face," the court nonetheless assumed, "[f]or the sake of judicial economy," that Act 42 was justified by compelling

governmental interests. *Id.* at 65a, 79a. Regardless of the state's interests, however, neither Act 42 nor District 4 could be described as "narrowly tailored, either relatively or absolutely." *Id.* at 87a. The Voting Rights Act did not justify the plan: "because Louisiana lost a seat in the United States House of Representatives, a plan with one black majority district would satisfy the Section 5 nonretrogression requirement given no more dramatic shift in the statewide ratio of white-to-black voters than is demonstrated by a comparison of the 1980 and 1990 census figures." *Id.* at 82a n.64.

In addition to finding Act 42 non-compact, the court also found that "the evidence supported an average, *net* white cross-over vote in non-judicial elections of between 10% and 25%"—*i.e.*, "black candidates will gain more votes from white cross-over voters (whites voting for black candidates) than they will lose from black cross-over voters (blacks voting for white candidates)." *Hays I*, *id.* at 83a-84a & n.65.

B. Act 1 Replaces Act 42.

While the Louisiana Attorney General appealed the district court's invalidation of Act 42 to this Court, the State convened a special legislative session to prepare a new redistricting plan. Again, racial considerations were overt. Many legislators "remain[ed] convinced that the Department of Justice would not pre-clear any plan that did not contain two majority/minority districts"—a belief that the Department "encouraged, if not demanded." *Hays II*, U.S. App. at 7a n.3. The Department's professed interest in stage-managing the legislative debate in Baton Rouge, of course, only encouraged those eager to pour Act 42's old wine into a new bottle.

The tacit alliance between the proponents of Act 42 and the Justice Department was very much in evidence during the special legislative session. On April 18, 1994, the districting committees of both chambers of the Louisiana legislature met to consider alternative plans, some with two majority-minority districts and some with only one. *See, e.g.*, SB8, HB6 (two districts); SB6, HB5 (one district), from Apps. D, E of Mot.

for Prelim. Inj. On April 19, the Senate passed a bill similar to the final Act 1. *Official Journal of the Senate of the State of Louisiana*, April 19, 1994, at 14. On the same day, the House considered a bill that had a single majority-minority district (centered in New Orleans), and defeated a bill similar to the one passed in the Senate. *Official Journal of the House of Representatives of the State of Louisiana*, April 19, 1994, at 3-5.

On April 20, with the two chambers deadlocked, Justice Department officials chose to intervene—albeit indirectly—through a letter of questionable authority to the counsel for the Legislative Black Caucus. Mot. to Affirm at 10 n.6. That letter, signed by the Honorable Deval L. Patrick, Assistant Attorney General for the Civil Rights Division, began by noting that "the Louisiana legislature is now in a special session . . . to consider the enactment of a new congressional redistricting plan." J.A. 229. The letter then proceeded to set forth an interpretation of VRA Section 5 and to apply the criteria in *Gingles* without addressing the court's findings in *Hays I* regarding non-compactness and the existence of a substantial net white cross-over vote. U.S. App. at 64a-65a 83a-84a & n.65. The letter closed by opining that "it remains reasonable to conclude that the Voting Rights Act requires the state to devise a congressional redistricting plan with two black-majority districts." J.A. 231.

Immediately upon circulation of the Patrick letter, the Louisiana House reversed course. On the very next day, April 21, it reconsidered and defeated by a 54-50 vote the previously-considered bill creating a single majority-minority district. *Official Journal of the House of Representatives of the State of Louisiana*, April 21, 1994, at 1-3. The House then reconsidered and passed by a comfortable (61-43) margin the originally-defeated bill with two majority-minority districts. *Id.* at 3. On April 22, the Senate approved the House-passed bill (which modified slightly the Senate's original bill) despite an attempted filibuster. *Official Journal of the Senate of the*

State of Louisiana, April 22, 1994, at 3-4. Shortly thereafter, Governor Edwin W. Edwards signed Act 1 into law.

C. The Court's Findings That Act 1 Constitutes an Unconstitutional Racial Gerrymander.

After Act 1 became law, this Court dismissed as moot Louisiana's appeal relating to Act 42. 114 S. Ct. 2731 (June 27, 1994). On July 6, 1994, plaintiffs filed an amended complaint, accompanied by voluminous statistical data on Act 1's seven Districts. These data included racial breakdowns and maps of Act 1's many split parishes and cities, plus historical data and additional maps of previous Louisiana districting plans. *See* PX 3, 4, 5; Ex. A, Tab 7, Mot. for Prelim. Inj. The court handled the case on an expedited basis so that the state could finalize its plans in August for the upcoming 1994 congressional elections.

The district court determined at the outset that plaintiffs' new evidence, coupled with the irregular shape of Act 1's new District 4, once again raised "the inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly." *Hays II*, U.S. App. at 3a. The court then offered Louisiana and the Justice Department the opportunity to rebut plaintiffs' *prima facie* case at yet another two-day trial—the third in the case—held on July 26 and 27, 1994.

Once again, Louisiana was unable to rebut the inference that it had intentionally classified its citizens by race, or to justify that classification. Apart from a perfunctory effort at explaining Act 1's boundaries on race-neutral grounds, the State's own witnesses frankly conceded that race had been the motivating factor behind the new redistricting plan. "The Senators themselves admitted that race played a large if not dominant role in the map as it is now drawn," the court explained, and "[t]hose persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature." *Hays II*, U.S. App. at 4a.

The court nonetheless looked beyond these admissions, holding that "Act (1) speaks for itself" on the intentional separation of the races. *Id.* at 3a. Appellants failed to rebut the inference of intentional racial classification arising from the "bizarre and irregular shape of District Four . . . [which] cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State." *Id.* at 3a. The plan's lack of respect for established political subdivisions convinced the court that Act 1 was "at best a cosmetic makeover" of the ill-fated Act 42. *Id.* at 3a n.1. The new District 4 contained even *fewer* whole parishes than did its predecessor in Act 42 (three instead of four), and split nearly the same percentage of its parishes (80% instead of 86%). *Compare Hays II*, U.S. App. at 3a *with Hays I, id.* at 65a.

The court also found that Act 1's bizarre shape, both overall and along the boundaries splitting parishes and cities, represented a marked departure from Louisiana's traditional districting practices. The court noted that Act 1's District 4 "is approximately 250 miles long, . . . making it considerably longer than any other district in the State." *Hays II*, U.S. App. at 16a. Marked by irregular lines, it "points fingers out into Caddo, Rapides, and Lafayette Parishes, while taking small bites out of St. Martin and Iberville Parishes." *Id.* The same Rorschach appendages that characterized Act 42 reappeared in the maps of parishes and cities in Act 1. *See* App. 1a-4a (cities); Mot. to Affirm at 9a, 12a, 16a-18a (parishes).

While these and other departures from traditional districting principles alone triggered strict scrutiny, further proof that Act 1 "intentionally segregates citizens into voting districts based on their race," *Hays I*, U.S. App. at 48a, emerged from the "statistical evidence showing the racial composition" of the split parishes and cities. *Id.* at 3a. These data revealed that the legislature *consistently* divided parishes by placing most *black* registered voters (more than 82% of blacks in split parishes) in District 4, while placing most *white*

voters (nearly 77% of whites in split parishes) in the neighboring predominantly white Districts (3, 5, 6, and 7).[2] Registered white voters from these 12 split parishes who were shunted into the adjacent white districts outnumbered registered black voters from the same areas by more than ten to one (about 348,000 to 34,000).

An equally dramatic racial segregation of voters occurred in Louisiana's major cities. Thus, "in its efforts to capture sufficient pockets of African-American voters," the new District 4 "spli[t] four of the State's largest cities, outside of New Orleans—Shreveport, Baton Rouge, Lafayette, and Alexandria." *Hays II*, U.S. App. at 16a-17a. The legislature could not have created a second black-majority district otherwise since nearly 58% of the black citizens (53% of the black registered voters) in District 4 resided in these four cities. In each city, areas with large black majorities (73% to 80%) were placed into District 4 while areas with even larger white majorities (83% to 88%) were placed into in Districts 5, 6 and 7. *See* J.A. at 228. In the split cities, *thirteen times* more registered white voters than their black counterparts ended up outside of District 4 (about 155,000 to 12,000).

The division of these cities in Act 1, as in Act 42, "destroy[ed] the common representation historically enjoyed by residents of the same municipality." *Hays I*, U.S. App. at 66a. Moreover, these cities comprised "four separate and major media centers," thereby forcing congressional candidates "to spend substantial amounts of money and time" above what would be required if city boundaries had been respected. *Hays II*, *id.* at 169 n.2.

---

[2] All demographic statistics cited in this brief are derived from the parish and city demographic data in PX4 and SX4. Split-parish registered voter data are available in tabular form in the Motion to Affirm at 1a-3a; split-city total population and registered voter data are available in similar form at J.A. 228. All references to racial percentages refer to total population unless the text specifies registered voter data. The calculations are based on District 4's total population of 603,000 and black population of 58.4%.

In light of these facts, the court readily found that the State's ham-handed attempt to deny the obvious role of race in drawing Act 1 was simply not credible. The State put forward two race-neutral explanations for its plan: (1) a geographer "testified that District 4 was drawn along the Red River Valley demonstrating a commonality of interest," and (2) witnesses claimed "that District 4 of the plan was modeled after the old eighth district in Louisiana." *Id.* at 17a-18a. But the court dismissed these explanations, finding that "[t]he Red River valley theory is clearly a *post hoc* rationalization similar to the Mississippi River theory offered to support Act 42 and equally unbelievable." Similarly, the court found that "[t]he State's purported reliance on District Four's similarity to the 'old Eighth' is mere pretext." *Id.* at 4a-5a. Considering the whole record, the court found that "Act 1 can only be explained credibly as the product of race-conscious decisionmaking," and that "[a]lthough the witnesses highlighted other factors that carved the contours of the awkward district, the *fundamental factor driving Act 1 was race.*" *Id.*

D. Louisiana's Failure to Provide a Compelling State Interest.

The court's determination that race was the "fundamental factor driving Act 1" triggered strict scrutiny, thereby requiring Louisiana to show that Act 1 is "narrowly tailored to further a compelling governmental interest." *Shaw*, 113 S. Ct. at 2832. As compelling governmental interests, Louisiana "contend[ed] that [1] incumbency politics, [2] the Voting Rights Act, and [3] remedying past legal and social or continuing social discrimination justified the racial segregation of voters." *Hays II*, U.S. App. at 7a. The latter two explicitly race-based justifications, of course, belied the State's primary claim that Act 1 was *not* motivated by race.

The court noted "at the outset that incumbency politics cannot justify racial classifications." *Id.* The court acknowledged, however, that "[a]dhering to federal anti-discrimination laws and remedying past or continuing

discrimination could constitute compelling governmental interests—*if* the State could 'demonstrate a strong basis in evidence for its conclusion that remedial action was necessary.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion)) (emphasis added). Ultimately, the court found that Louisiana had presented no such strong basis in evidence. *Id.* at 6a-7a.

The court accepted at face value the contention that "[t]he State Legislature believed that the Voting Rights Act compelled the creation of a second majority-minority district" and agreed that the United States Attorney General's "threat [to withhold pre-clearance under VRA Section 5], whether issued by her or some middle level bureaucrat, was a matter of real concern to the State." *Id.* at 7a n.3. While acknowledging that "[l]itigation in the District of Columbia, and everywhere else is expensive," the court concluded that this "*real* concern is not a *compelling* one." *Id.* (emphasis added).

The court found, however, that "[n]either the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose or effect." *Id.* at 8a, 19a (Shaw, C.J., concurring). The court also rejected the State's Section 2 defense. After reciting the "three conditions to a Section 2 'dilution' claim" set forth by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), the court found that "[t]he evidence convincingly proves that the State cannot clear the first *Gingles* hurdle"—compactness. U.S. App. at 8a. Specifically, "[d]espite a minority population of approximately 30%, demographic distribution is simply too diffuse to generate a majority voting age population in any district outside of the Orleans Parish region." *Id.* at 8a n.4.

Finally, the court dismissed Louisiana's contention that Act 1 was otherwise necessary to remedy past or present discrimination. Both the majority and concurring opinions acknowledged the "sordid history of unconstitutional treatment

of black citizens in Louisiana" that remains "indelibly imprinted in our memories." *Hays II*, U.S. App. at 9a-10a, 20a-21a. Nonetheless, the court concluded that permitting the mere invocation of that history to justify Act 1 would "herald the demise of equal protection." *Id.* at 10a. "Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the re-segregation of Louisiana by racially configured voting districts is warranted." *Id.* In short, the district court invalidated Act 1 because "defendants utterly failed to demonstrate how gerrymandering could remedy the problems asserted as compelling interests." *Id.* at 10a & n.6.

SUMMARY OF ARGUMENT

This case is not about the topology of unusually-shaped districts, but about the authority of a State to classify its citizens by race. In redistricting, as with other forms of state action, intentional racial classification triggers strict scrutiny.

Recognizing that Act 1 must fail under traditional Fourteenth Amendment analysis, appellants endeavor first to avoid strict scrutiny altogether and then to dilute its traditional rigor. They argue variously that this Court's decisions, the Fourteenth Amendment itself, and the Voting Rights Act exempt redistricting from strict scrutiny and that racial gerrymanders are no different than run-of-the-mill political gerrymanders. Moreover, even if the traditional equal protection analysis applies, they argue, the test must be what the State "reasonably" or "legitimately" *believed* the Voting Rights Act required, not what the Act *actually* required. Appellants' attempts to avoid strict scrutiny altogether and to dilute its traditional rigor are neither legally nor factually sound.

I. A. Not so many years ago, a respected commentator treated as self-evident the proposition that for government to classify citizens by race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."

Alexander M. Bickel, *The Morality of Consent* 133 (1975). But today, the Solicitor General not only admits that race played the overriding role in Act 1; he trumpets that role, seeking a blanket redistricting exemption from strict scrutiny to allow the Justice Department to continue its racial engineering under the cloak of the VRA. This Court in *Shaw*, however, already rejected the Solicitor General's argument that race-based redistricting "does not give rise to an equal protection claim, absent proof that it has the intent and effect of diluting the majority's voting strength." U.S. Br. at 14. And neither the Fourteenth Amendment nor the Voting Rights Act, properly construed, enshrine *group* rights over *individual* rights, or carve out an exemption from strict scrutiny for intentional racial classification in redistricting.

B. *Shaw* thus stands in the mainstream of this Court's equal protection jurisprudence. While Act 1's bizarre District 4 fails even the Solicitor General's purely aesthetic test, it is Louisiana's intentional classification of its voters by race—not the shape of District 4 *per se*—that is constitutionally proscribed. After three separate trials, the court found that Louisiana had violated traditional districting principles by splitting parishes and cites along racial lines and that the "*fundamental factor driving Act 1 was race*." *Hays II*, U.S. App. at 3a. Appellants have not shown that these findings were clearly erroneous. Nor have they demonstrated that the court erred in dismissing Louisiana's "old Eighth" justification in light of evidence that District 4 was built by selecting black voters and excluding white voters from prior versions of the "old Eighth" district and then adding two heavily black areas that *never* were part of *any* of the former versions of the "old Eighth." Pretext aside, Act 1 represents nothing less than the ascendancy of a "separate but better off" policy for both Louisiana's black *and* white citizens. *Wright v. Rockefeller*, 376 U.S. 52, 62-67 (1964) (Douglas, J., dissenting).

II. A. Appellants' efforts at diluting the rigor of strict scrutiny fare no better. Their claimed need for "some breathing

room," La. Br. at 35, or a "margin of safety," U.S. Br. at 27, between what the Voting Rights Act requires and what the Constitution forbids has particularly far-reaching implications. Changing the test from what the Voting Rights Act *actually* required to what Louisiana "reasonably" or "legitimately" *believed* it required would create an unprecedented "good faith" defense in constitutional cases whenever a State claims to have been "reasonably" mistaken about the requirements of federal law. The ancient principle that ignorance of the law is no defense and this Court's unbroken practice of adjudicating constitutional violations on the merits, without regard to good intentions, both preclude any such contention. The asserted need for "breathing room" to comply with the Voting Rights Act, therefore, cannot justify the constriction of constitutionally-guaranteed rights, reversing the traditional canon that statutes are construed to avoid conflicting with the Constitution, not vice-versa.

B. The court below made findings sufficient to encompass even appellants' unprecedented "reasonable belief" theory by concluding that Louisiana "did not have a basis in law or fact to *believe* that the Voting Rights Act *required* the creation of two majority-minority districts." U.S. App. at 9a (emphasis added). Appellants offer no grounds for disturbing the lower court's conclusions concerning either Sections 5 or 2 of the Voting Rights Act, or concerning appellants' farfetched demand that the federal courts guarantee a "fair allocation of political power between white and nonwhite voters." U.S. Br. at 34; La. Br. at 38. The court below did not clearly err in finding no evidence that "the failure to create a second majority-minority district would be either a retrogression of minority [voting] strength or have an illegal purpose or effect." *Hays II*, U.S. App. at 8a-9a. The same is true of VRA Section 2. The court correctly held that Louisiana failed to show that Section 2 required a second majority-minority district since "[t]he evidence convincingly proves that the State cannot clear the first *Gingles* hurdle." *Id.* at 8a. Nor did the court err in refusing to go beyond the

Voting Rights Act to find a compelling interest, especially absent "concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures." *Id.* at 10a.

ARGUMENT

Before turning to the merits, it is appropriate to respond briefly to Louisiana's contention that plaintiffs lack Article III standing. La. Br. at 41-42 (citing *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992)). Louisiana argues that plaintiffs suffered no "injury in fact" and have identifed no "possible personal benefit they would derive from a favorable decision." *Id.* at 41. But that argument misperceives the nature of the injury alleged. Plaintiffs' alleged injury derives from "the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *Metro Broadcasting v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). This injury long has sufficed for Article III standing, *see, e.g., Heckler v. Mathews*, 465 U.S. 728, 739 (1984); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), regardless of the race of the person claiming standing, *see, e.g., Powers v. Ohio*, 499 U.S. 400 (1991). As the court below explained, "[w]hen voting districts are carefully planned like racial wards, an *individual* injury occurs." *Hays II*, U.S. App. at 11a. *See also Shaw*, 113 S. Ct. at 2827-28.

Nor does it matter that plaintiffs reside in District 5, not District 4. Act 1 created District 4 by classifying voters by race and placing them in District 4 or a neighboring district on that basis. Plaintiffs may not have a right to be placed into any particular district, but they *do* have a right not to be placed into or excluded from a district because of the color of their skin. *See Powers*, 499 U.S. at 409 ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."). Here, plaintiffs' goal has always been to cast their votes as part of an electorate not segregated by race; to that

end, it matters not whether a particular plaintiff is white (Hays and Stokley), black (Adams) or Asian-American (Singleton). In short, plaintiffs have been harmed by being classified on the basis of their race, just like the plaintiffs challenging the "separate but equal" schools in *Brown v. Board of Education*, 347 U.S. 483 (1954).

I. ACT 1 IS SUBJECT TO STRICT SCRUTINY.

If any constitutional principle of the last half-century is firmly established, it is this: state action reflecting a suspect classification or infringing a fundamental right must be subjected to strict scrutiny. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *cf. United States v. Carolene Prod.*, 304 U.S. 144, 153 n.4 (1938). This case involves *both* the historically most suspect classification—*race*—and the most important civic right—the right to *vote*. *See, e.g., Shaw*, 113 S. Ct. at 2824; *Reynolds v. Sims*, 377 U.S. 533, 535 (1964). Yet, while openly admitting that Louisiana "deliberately used race in a purposeful manner," U.S. Br. at 14; La. Br. at 14, in a context that intimately affects the fundamental right to vote, appellants steadfastly resist subjecting Act 1 to strict scrutiny.

Having set out to overturn fundamental constitutional precepts and enshrine a regime of group entitlement in redistricting, appellants find themselves without ground to stand on. They offer four arguments for insulating race-based districting from strict scrutiny: (1) this Court in *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) supposedly carved out a "redistricting" exception to the traditional Fourteenth Amendment analysis, U.S. Br. at 10, 14; (2) strict scrutiny would be "inconsistent with the central purpose of the Equal Protection Clause" because the traditional "principle of equal treatment" cannot be "fully effectuated" by "considering each person as an individual," *id.* at 15; (3) in redistricting, States "must be free to give the same consideration to the claims of racial minority groups . . . [as] any other interest group," *id.* at 16; and (4) relaxed scrutiny is

appropriate in light of the "legal context" of redistricting, owing to "Congress's judgment that States should be conscious of the racial consequences of their redistricting decisions." *Id.* at 18-19.

These arguments have no basis in principle or precedent. Indeed, if applied broadly in race-discrimination cases, they would turn current jurisprudence upside down. For if only *group* results mattered, the public schools would still be segregated under a "separate but equal" regime, which by definition (at least in theory) treated "groups" the same. *But see Brown v. Board of Education*, 347 U.S. 483 (1954). Indeed, appellants' theory, if applied across the board, would mean that intentional segregation claims would fail absent proof of disparate results. *But see Loving v. Virginia*, 388 U.S. 1 (1967) (prohibition of interracial marriage); *Hamm v. Virginia Bd. of Elections*, 230 F. Supp. 156 (E.D. Va.), *aff'd mem.*, 379 U.S. 19 (1964) (segregated voting registration and tax records). The Fourteenth Amendment guarantees, not equality of *results* among *groups*, but rather equality of *treatment* for *individuals*—in redistricting as elsewhere.

A. Where Race Is a "Motivating Factor," State Action Must be Subjected to Strict Scrutiny Unless the Same Result Would Have Obtained Without Regard to Racial Considerations.

This Court's opinion in *Shaw* strongly reaffirmed that race-based redistricting is like any other form of official racial discrimination and subject to the same well-established analysis: "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an attempt to separate voters into different districts on the basis of race, and that the separation lacks sufficient jusitification." 113 S. Ct. at 2328. *Shaw* relied on a long line of cases involving racial classifications, from *Yick Wo* v. *Hopkins*,

118 U.S. 356 (1886), through Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896), to modern expressions of race neutrality in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), *Wright* v. *Rockefeller*, and *Loving v. Virginia*. These precedents underscore that classifications of citizens solely on the basis of race "'are by their very nature odious to a free people,'" *Shaw*, 113 S. Ct. at 2824 (quoting *Hirabayashi v. United States*, 320 U.S. 81 (1943)), and that even an ostensibly race-neutral statute may "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* (citing *Croson*, 488 U.S. at 493 (plurality opinion)).

As these cases recognize, "[t]he *central purpose* of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." *Shaw*, 113 S. Ct. at 2824 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)) (emphasis added). By noting that only those plans that "rationally *cannot be understood* as anything other than an attempt to segregate voters," 113 S. Ct at 2328 (emphasis added), *Shaw* simply reaffirmed this Court's traditional approach for resolving claims of official racial discrimination. In *Arlington Heights*, for example, the Court held that an equal protection claim exists where state action does not *facially* discriminate along racial lines if that action is "*unexplainable* on grounds other than race." *Washington*, 429 U.S. at 266 (emphasis added).

Under this traditional analysis, state action is subjected to strict scrutiny when a plaintiff establishes that race is "a motivating factor" behind the State's decision and the State fails to establish that "the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 266, 271 n.21. Thus, "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*,

471 U.S. 222, 228 (1985) (citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977)).

Contrary to appellants' assertions, this Court never has suggested that redistricting cases are impervious to this traditional equal protection analysis; indeed, that traditional analysis was partially *derived from* redistricting cases. *See Arlington Heights*, 429 U.S. at 265-266 (relying on *Wright v. Rockefeller* and *Gomillion v. Lightfoot)*. The court below, like other courts reviewing redistricting plans after *Shaw*, thus properly applied the established analysis of *Arlington Heights* and subsequent cases. *See Hays I*, U.S. App. at 44a-57a; *Shaw v. Hunt*, 861 F. Supp. 408, 427-28 (E.D.N.C. 1994); *Vera v. Richards*, 861 F. Supp. 1304, 1332-33 (S.D. Tex. 1994); *Johnson v. Miller*, 864 F. Supp. 1354, 1372-73 (S.D. Ga. 1994), *prob. juris. noted*, 115 S. Ct. 713 (Jan. 6, 1995).

1. Appellants never cite *Arlington Heights*, *Gomillion*, or *Wright*. The reason for that omission is hardly a mystery: they seek to depict this case as no more than a *redistricting* case, not a *race* case. According to the Solicitor General, this Court in *UJO* exempted redistricting from the traditional analysis applicable to racial classifications when "[f]ive Justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that it has the intent and effect of diluting the majority's voting strength." U.S. Br. at 14. Under this approach, *UJO* would establish a general rule that individual equal protection claims are not cognizable in redistricting cases except insofar as a State fails to adhere "traditional districting principles." *Id.* at 15. *Shaw* would thus stand as an exceedingly narrow (and anomalous) exception to *UJO*'s general rule.

This argument might have more force had it not been explicitly rejected by the Court in *Shaw*. The five Justices in *UJO* cited by the Solicitor General did not address equal protection claims *generally*, but rather those claims brought "under the framework the Court previously had adopted for

vote-dilution cases." *Shaw*, 113 S. Ct. at 2829. *UJO* "did not purport to overrule *Gomillion* or *Wright*" nor did it limit "non-vote-dilution" equal protection claims to cases where "traditional districting principles" have been ignored. *Id.* at 2830. Rather, it preserved claims that a reapportionment plan may be "so irrational on its face that it immediately offends principles of racial equality." *Id.* at 2829.

Far from carving out an exception, therefore, *Shaw* simply applied the general rule that race-based classifications *are* subject to strict scrutiny, even in redistricting cases. 113 S. Ct. at 2830-32. While *Shaw* did not address all possible ways of *proving* such a claim, nothing in the Court's opinion suggests that the traditional analytical framework of *Arlington Heights* was rejected.

2. The Solicitor General next makes an even broader argument based explicitly on an unprecedented theory of "group rights" under the Fourteenth Amendment. Treating the intentional creation of majority-minority districts as suspect, he argues, "would be inconsistent with the central purpose of the Equal Protection Clause." U.S. Br. at 15. The usual "principle of equal treatment" for individuals thus must give way because "[r]edistricting . . . presents a different situation" in which "States do not treat people as individuals, but as members of groups." *Id.* Under this view, *Shaw* is limited to those districts "much more unusual in shape" than politics normally permits since only such "highly irregular majority-minority districts may *convey the message* to the public that race has submerged all other redistricting values." *Id.* at 18, 21 (emphasis added).

No authority is cited for this theory that only aesthetically-challenged districts "convey messages" that produce constitutional injury.[3] The injury here flows not from

---

[3] One may question how often voters form their perceptions about whether the State has been even-handed by analyzing district shapes *per se*. Voters are much more likely to know when their city or parish has been split in

(continued...)

district maps *themselves*, but from the *intentional segregation* of citizens into different districts based on their race.

Nor does the Fourteenth Amendment guarantee equal results for racial or other *groups*; to the contrary, it explicitly guarantees "equal protection of the laws" to *individuals* ("any person"). To say that redistricting is a special exception where only group rights apply is to ignore—indeed, to turn upside down—Judge Wisdom's observation that "the ballot and the voting booth" is the "one area above all others where the Constitution [must be] color-blind." *Anderson v. Martin*, 206 F. Supp. at 705. Far from dismissing individual rights in this context, this Court has long recognized racial vote-dilution claims as an *extension* of *individual* rights, *see*, *e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973), without abandoning the "Lincoln tradition" that it is "the individual [who] is important, not his race, his creed, or his color." *Shaw*, 113 S. Ct. at 2827 (*quoting Wright*, 376 U.S. at 66 (Douglas, J., dissenting)).

The Solicitor General's group-rights theory strikes at the heart of the "Lincoln tradition." Not only redistricting, but all race-based classification can readily be deemed "*group*-based." Racial classifications offend basic constitutional values precisely *because* they treat citizens as members of groups, not as individuals. Any suggestion, therefore, that intentional racial segregation in redistricting is constitutionally *permissible* (indeed, possibly constitutionally *required*) would turn the Fourteenth Amendment on its head.

---

[3] (...continued)
two, with most black voters in one district and most white voters in another. And, whether black or white, voters also are likely to be suspicious of officials who say, or imply, that they are better off when separated along racial lines. That is particularly true of persons like plaintiffs who are engaged in grass-roots political activity and who recognize immediately the diminished opportunity for coalition-building across racial lines as the electorate is divided by race.

3. Appellants nonetheless argue that a "group rights" approach here is compelled by *Davis v. Bandemer*, 478 U.S. 109 (1986). When engaged in redistricting, they contend, States invariably must "reconcile the competing claims" made by a whole range of interests including "racial, ethnic, and religious groups." U.S. Br. at 16; La. Br. at 17 (citing *Davis*, 478 U.S. at 147 (O'Connor, J., concurring in judgment)). Consequently, appellants argue contend that States must remain "free to give the same consideration to the claims of racial minority groups . . . [as] any other interest group." U.S. Br. at 16.

Davis, however, will not bear appellants' sweeping interpretation. Indeed, far from *compelling* a "group rights" approach, Justice O'Connor's opinion rejected "any group right outside the context of racial discrimination." 478 U.S. at 151. And even there, her opinion carefully noted that it is the *individual* rather than the *group* who is protected because of the "stronger nexus between individual rights and group interests" in that context. *Id.* at 151-152. *Davis* thus actually underscores that the State's ordinarily wide latitude in redistricting does *not* extend to *race*-based redistricting. Instead, racial classifications remain inherently suspect in the redistricting context because, while "[p]olitical affiliation is the keystone of the political trade . . . [r]ace, ideally, is not." *UJO*, 430 U.S. at 171 n.1 (Brennan, J., concurring); *see also Shaw*, 113 S. Ct. at 2828 ("[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, [the case law] would seem to compel the opposite conclusion.").

Shaw's reaffirmation of individual rights in redistricting, of course, does not proscribe any and all consideration of race in that context. Indeed, *Shaw* emphasized that "this Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances." 113 S. Ct. 2824. "[A] legislature always is *aware* of race when it draws district lines"; "when members of a racial group live

together in a community," a plan taking that into account "may reflect wholly legitimate purposes." *Id.* at 2826. Members of one race *can* but do not *necessarily* form a cohesive and compact community. As *Shaw* emphasized, while race may be a legitimate consideration in helping to determine the *boundaries* of a particular community, the Constitution emphatically rejects the notion that the races *per se* constitute different communities:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.

113 S. Ct. at 2827.

The presence of concentrated black (or white) populations, therefore, may be relevant just like the "traditional north-south, ethno-religious, economic and historical distinctions in Louisiana." U.S. App. at 17a. (Shaw, C.J., concurring). But States may not make a suspect classification the touchstone for an electoral district—for example, if Louisiana were deliberately to set out to create a predominantly Roman Catholic district.

Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1994), although decided under the Religion Clauses of the First Amendment, is instructive on this point. The Satmar Hasidic sect of Judaism incorporated the Village of Kiryas Joel under a general New York law permitting "almost any group of residents" to form their own municipal government. *Id.* at 2485. But the special legislation that

created the Kiryas Joel School District was, by the very fact that it applied only to the village of Kiryas Joel, considered to have been "purposely drawn to separate Satmars from non-Satmars." *Id.* 2494. It was the State's action in endorsing this pre-existing religious division that violated the First Amendment. *Id.* at 2504 (Kennedy, J., concurring in the judgment). Were New York to "allow *all* villages to operate their own school districts"—and thus remove religion as the force driving the legislative classification—state support for educating Kiryas Joel's handicapped students would have been constitutionally permissible. *Id.* at 2498 (O'Connor, J., concurring in part).

Kiryas Joel and traditional Fourteenth Amendment cases like *Arlington Heights* and *Hunter v. Underwood* thus answer Louisiana's hyberbolic claim that "[a] blanket application of strict scrutiny [to redistricting would] render presumptively unconstitutional countless white-majority districts as well as black majority districts." La. Br. at 16. Most districts nationwide comprised of a majority of one race simply reflect existing communities, and were not "motivated" by race. Thus, under *Shaw*, strict scrutiny is the exception, not the rule—just as it has proven to be the exception, not the rule in jury-selection cases. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Hernandez v. New York*, 500 U.S. 352 (1991). Most post-*Shaw* decisions, thus, have applied strict scrutiny only to a *single* district, not to *all* districts.[4]

4. Appellants finally argue that applying traditional equal protection analysis to redistricting would "give []insufficient weight to Congress's judgment that States should be conscious of the racial consequences of their redistricting

---

[4] In three of the four cases applying strict scrutiny, the test was applied to only one district. *Hays; Shaw v. Hunt*, 861 F. Supp. 408,427-28 (E.D.N.C. 1994); *Johnson v. Miller*, 864 F. Supp. 1354, 1372-73 (S.D. Ga. 1994), *prob. juris. noted*, 115 S. Ct. 713 (Jan. 6, 1995). Even in Texas, only three of that State's thirty districts were subjected to strict scrutiny. *Vera v. Richards*, 861 F. Supp. 1304, 1332-33 (S.D. Tex. 1994).

decisions." U.S. Br. at 18-19. The Voting Rights Act, they suggest, sets the "legal context" in which such state action is to be evaluated. Applying strict scrutiny to race-based redistricting, on this view, would "place States in a legal straightjacket," or make "compliance with a valid act of Congress immediately . . . suspect under the Fourteenth Amendment." *Id.* at 19; La. Br. at 18. But no penumbra emanating from the Voting Rights Act, or any other federal legislation, can be invoked to justify state discrimination on the basis of race.

It is misleading to conflate *Congress'* authority to remedy perceived racial discrimination (power expressly *conferred* by Section 5 of the Fourteenth Amendment) with *state* authority to impose race-based classifications (power expressly *withdrawn* by the Fourteenth Amendment). *See, e.g., Metro Broadcasting*, 497 U.S. at 565-566; *UJO*, 430 U.S. at 169 (Brennan, J., concurring). As this Court only recently emphasized in *Shaw*, the VRA does not give States "*carte blanche* to engage in racial gerrymandering." *Shaw*, 113 S. Ct. at 2831 (emphasis added). When a State classifies its citizens by race, only the most "searching judicial inquiry" is appropriate because otherwise "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Shaw*, 113 S. Ct. at 2824 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)).

B. The District Court Properly Determined That Act 1 Triggered Strict Scrutiny.

Even if appellants' reading of *Shaw* were correct and the traditional Fourteenth Amendment analysis did not apply in redistricting, this case would still call for strict scrutiny. The Solicitor General suggests that the constitutional violation at issue in *Shaw* and here is based entirely on a district's *shape*. Under this view, four considerations are relevant in identifying a district that triggers strict scrutiny: (1) the district must be

visually bizarre—"much more unusual in shape than districts drawn by the State to accommodate other political interests"; (2) it must be "extremely irregular" (as opposed to "somewhat irregular"), *i.e.*, it must "depar[t] dramatically from the State's traditional redistricting practices"; (3) the district must be irregular "on its face," *i.e.*, without regard to "a subjective inquiry into the legislature's intent"; and (4) it is the district as a whole—and not "isolated segments"—that must be bizarre. U.S. Br. at 21-22. Louisiana suggests a similar "map only" test. La. Br. at 19-20.

Appellants never explain precisely what constitutional principles underlie these tests nor how they would work in practice. Their wholly-aesthetic approach, indeed, would apparently exclude previously-relevant considerations such as statistical data on the racial composition underlying district lines, *see, e.g., Gomillion*, 364 U.S. at 341; *Wright*, 376 U.S. at 54-55, as well as "frank concession[s]" of a specific intent to segregate voters by race under a "separate but better off" theory. *Wright*, 376 U.S. at 61-62 (Douglas J., dissenting). Appellants' fixation on district topology also appears to contradict this Court's observation in *Shaw* that a claim can be based on evidence that "a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles," including "respect for political subdivisions," 113 S. Ct. at 2827—a determination that often requires consideration of facts besides a district's shape.[5]

The closest appellants come to addressing these contradictions is the Solicitor General's statement that "*Shaw* mandates an objective inquiry into whether a district conveys

---

[5] For example, it may be that none of the districts depicted in the maps appended to Louisiana's brief would require strict scrutiny under appellants' reading of *Shaw*. La. Br. at 26 n.31. But this is true only because Louisiana has provided sparse demographic data; whether these districts conform to the State's historic districting practices is not apparent from the maps themselves. *Id.*

the impression that racial considerations have been pursued to the exclusion of other redistricting values, not a subjective inquiry into the legislature's intent." U.S. Br. at 23. Yet the court below undertook *precisely* such an objective inquiry. If the court had deemed "[t]he State's acknowledgement that it intended to create a majority-minority district," *id.* at 24, to be dispositive in and of itself, the three evidentiary hearings and the extensive discussion of facts in court's two opinions would have been entirely superfluous.

The district court's comprehensive inquiry led it to conclude that the "bizarre and irregular shape of District Four raised an inference Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly"—an inference confirmed by "[t]he statistical evidence showing the racial composition of the districts." U.S. App. at 3a. Under *Gingles*, such determinations are "particularly dependent upon the facts of each case," and call for "an intensely local appraisal" benefitting from the "trial court's particular familiarity with the indigenous political reality." 478 U.S. at 78-79. The court below did not clearly err either in appraising plaintiffs' *prima facie* case, or in finding that appellants failed to rebut it.

1. Plaintiffs Established A *Prima Facie* Case That Racial Considerations Were The "Motivating Factor" Behind Act 1.

Contrary to appellants' assertion, plaintiffs did not carry their burden below "merely [by] the presentation of a map depicting the congressional district boundaries." La. Br. at 40 n.47.[6] Rather, plaintiffs showed, among other things, that

---

[6] Plaintiffs presented the following types of evidence before the trial on Act 1: (1) maps of congressional districts in Louisiana since 1963 (PX 3); (2) statistical evidence showing the racial composition of each of Act 1's seven districts and of each of its many split parishes and cities (PX 4); (3)

(continued...)

Act 1's District 4 divided twelve of its fifteen parishes— the most "fundamental unit[s] of societal organization in the history of Louisiana." *Hays I*, U.S. App. at 65a. District 4's twelve split parishes constituted: (1) *three times* more split parishes (previous maximum—four) than any single previous congressional district; *see* PX 3; USX 8 Table 1; and (2) almost *twice* as many split parishes (previous maximum—seven) as any *entire congressional districting plan* in Louisiana history. U.S. Br. 25. While the United States may not consider this "an extraordinary departure from the State's usual redistricting practices," U.S. Br. at 26, the court below did not clearly err in deciding otherwise. *Hays II*, U.S. App. at 3a.

Appellants insist that "parish . . . lines have never been sacrosanct in congressional redistricting" and that Louisiana has "split parishes and cities for a variety of purposes." U.S. Br. at 25; La. Br. at 27-28. But "the statistical evidence showing the racial composition of the districts," *Hays II*, U.S. App. at 3a, plainly reveals why *these* particular parishes were split. *Without exception*, each time the boundary of District 4 split a parish, blacks fell disproportionately into District 4, and whites disproportionately into neighboring districts. *See* Mot. to Affirm at 1a-3a. This parish-splitting often assumed *Gomillion*-like proportions. In Iberville Parish, for example, an uncouth multi-sided figure fences all but 59 of that parish's more than 9000 black registered voters into District 4. *Id.* at 3a, 18a.

The role that race played in dividing the District 4's cities is even more blatant. Of the *seventeen* cities and towns divided by Act 1, *fourteen* were strung along District 4's borders. J.A. 228. *Without exception*, each of these fourteen split municipalities placed predominantly black areas into

---

[6] (...continued)
maps of the split cities (PX 5); (4) maps of the split parishes (App. A, Mot. for Prelim. Inj.); (5) the record of the Act 1 legislative proceedings (App. B-E, to Mot. for Prelim. Inj.); and (6) the full record from the two previous evidentiary hearings.

District 4; Districts 3, 5, 6 and 7 absorbed the remaining white neighborhoods. *Id.* Only 22 of the 1756 voters in District 4 from the town of New Roads (in Pointe Couple Parish) are white, but voters from the same town placed in District 6 are almost 89% white (1510 white compared to 193 black).

The same four geographically-dispersed, major cities that anchored the "Zorro" district in Act 42—Alexandria, Baton Rouge, Lafayette and Shreveport—again provided the lion's share (nearly 58%) of District 4's black population. Three of these cities—Alexandria, Lafayette and Shreveport—had *never* been split in any previous congressional redistricting plan. PX 3. In each of these four cities, the neighborhoods assigned to District 4 were overwhelmingly (73-80%) black, while the nearby areas placed in Districts 5, 6, and 7 were overwhelmingly (83-88%) white. *See* J.A. at 228.[7] Again, the Solicitor General may not believe that these facts reveal "an extraordinary departure from the State's usual redistricting practices," U.S. Br. at 25-26, but the court below did not clearly err in finding otherwise. *Hays II*, U.S. App. at 3a.

2. Appellants Failed to Rebut Plaintiffs' *Prima Facie* Case.

The departures from Louisiana's traditional districting principles described above established a *prima facie* case of racial discrimination (even under the Solicitor General's test), which appellants failed to rebut at trial. *Hays II*, U.S. App. at 3a. Far from providing a credible race-neutral justification for District 4's boundaries, appellants' evidence only confirmed that race controlled Act 1's creation.

Appellants continue to maintain that the (supposed) resemblance of District 4 to prior configurations of Louisiana's

---

[7] And as the city maps of Shreveport and Alexandria reveal, App. 1a, 4a, the shadow cast by racial gerrymandering along the boundaries of these cities again flouted the requirement of contiguity. See *Hays I*, U.S. App. 64a-65a ("Such tokenism mocks the traditional criterion of contiguity.").

Eighth congressional district is "[t]he most salient fact in this case." U.S. Br. at 22; La. Br. at 21-23. But there can be no doubt on this record that from start to finish, District 4 was based on race. The State's witness, Mr. Koepp, "was asked to look at the old Eighth District" because it had "the highest minority population district in the state other than the minority district number two." 7/21/94 Trial Vol. 2 at 11. From that point on, parishes and parish parts were added or subtracted, always with the apparent aim of blackening District 4 and whitening adjacent districts.

The end result departed dramatically from any of the many versions of the "old Eighth." No previous configuration of the "old Eighth" ever split more than four parishes; District 4 split twelve. *See* PX3. Likewise, no version of the "old Eighth" ever included fewer than twelve *full* parishes; District 4 included only three. *Id.* The notion that District 4 bears any meaningful resemblance to the "old Eighth" falls apart entirely upon consideration of District 4's constituent building blocks.[8]

At one time or another, 23 of Louisiana's 64 parishes were included in one or more versions of the "old Eighth." *See* maps at PX3. Only five whole parishes—Rapides, Avoyelles, Pointe Coupe, West Baton Rouge, and Iberville—were *always*

---

[8] The Solicitor General asserts that District 4 "most closely resembles District 8 in the congressional plans used in 1967-70 and 1971-72." U.S. Br. at 22. But six entire parishes included in those versions of the "old Eighth" appear nowhere in District 4. Those parishes and their respective white populations are as follows: Avoyelles (72%), Allen (77%), Beauregard (84%), Grant (85%), LaSalle (90%), and Vernon (74%). More revealing still is the proportion of District 4's population that falls outside the boundaries of these versions of the "old Eighth." For example, nine of District 4's fifteen parishes fall outside the boundaries of District 8 from the late 1960s (these nine parishes are Caddo, Red River, De Soto, St. Martin, St. Landry, Lafayette, Ascension, East Baton Rouge, and Evangeline). These parishes—fully outside the "old Eighth" of the late 1960s—are home to 72% of District 4's total population and 80% of District 4's black population. The figures are similar for the "old Eighth" from the early 1970s.

included entirely within the "old Eighth." If District 4 truly were intended to resemble the "old Eighth," then surely it would have retained these five core parishes. But in fact, it retained only one: West Baton Rouge. Another parish, Avoyelles (72% white) was excluded altogether. The remaining three parishes were only partially included, with their populations predictably divided along stark racial lines. The portions of these three parishes included in District 4 are majority-black, while the excluded portions are 86% white.

The same pattern emerges in the parishes *added to* the "old Eighth." Five of District 4's fifteen parishes—Caddo, DeSoto, and Red River at the northwest tip, and St. Martin and Lafayette in the south-central part—were *never* included in *any* configuration of the "old Eighth." DeSoto and those parts of Caddo and Red River parishes that allow District 4 to reach to Shreveport have mostly (53 %) black voters, while voters in the excluded parts are predominantly (88%) white. Likewise, the portions of St. Martin and Lafayette included in District 4 are about 57% black, while the fenced-out portions of these parishes are about 85% white. Overall, the areas added from these five parishes—never part of *any* version of the old Eighth—contain approximately 36% of District 4's black population.

The State's "Red River valley theory" was similarly unavailing, as it cannot conceivably be deemed the unifying force behind District 4. *Hays II*, U.S. App. at 5a. Rather than cutting a wide swath stretching miles on both sides of the Red River, District 4 jumps from one side to the other as necessary to grab black voters or to jettison white ones. *See* Mot. to Affirm at 9a (Caddo), 11a (Natchitoches), 12a (Rapides). Nor can the State's theory justify District 4's extension to East Baton Rouge and Lafayette, which are nowhere near the Red River but together supply more than 35% of District 4's black population. These points, obvious to the three district-court judges familiar with Louisiana geography, as well as its cultural and political history, only underscored the lack of any

credible justification for District 4. Not surprisingly, then, the court dismissed Louisiana's ostensible race-neutral justifications as nothing but "*post hoc* rationalization" and "mere pretext." *Hays II*, U.S. App. at 5a.

Louisiana complains that Act 1 should have been considered "presumptively valid" under *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), and that the district court unfairly treated the "old Eighth" justification as "irrelevant." La. Br. at 20-22. But *Voinovich* did not involve an equal protection challenge. 113 S. Ct. at 1157. Plaintiffs' *prima facie* case shifted to Louisiana the burden of rebutting the inference that it had "segregate[d] the races for purposes of voting." *Hays II*, U.S. App. at 3a. Having heard six days of trial on Act 42 and Act 1, the district court fully appreciated the record differences between District 4 and the "old Eighth," *id.* n.2, and considered them before finding that the "*fundamental factor driving Act 1 was race.*" *Id.*

Appellants' desperation to avoid strict scrutiny leads them to dwell obsessively on the very next sentence in the district court's opinion: "Race-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." *Hays II*, U.S. App. at 5a. *See* U.S. Br. at 9, 10, 11, 12, 14, 18, 20; La. Br. at 9, 13, 15 n.16. On appellants' view, that sentence establishes that the district court ignored *Shaw*'s observation that "[t]his Court has never held that race-conscious state decisionmaking is impermissible in *all* circumstances." 113 S. Ct. at 2824. But that interpretation of the district court's opinion is untenable. The quoted sentence immediately follows the court's finding that "*the fundamental factor driving Act 1 was race*"; that finding would have been quite gratuitous if the district court decided to subject District 4 to strict scrutiny simply because Louisiana was "aware" of race in drafting Act 1. To the contrary, the district court properly set forth and applied the legal standard developed in *Shaw*, *Wright*, and *Arlington Heights*, *see Hays I*, U.S. App. at 48a n.12; 49a n.17; 69a nn.45 & 46; *Hays II*, U.S. App. at

3a-5a, under which state action is subject to strict scrutiny if "motivated" by race.

What exactly the district court meant by "[r]ace-conscious" in the oft-quoted sentence is not entirely clear; it could well have used the term as a synonym for "race-based." *See, e.g.*, Random House Dictionary of the English Language 432 (2d ed. 1987) (defining "conscious" as, among other things, "deliberate; intentional" and "acutely aware of or concerned about"). In any event, there is no need to parse the term's fine shades of meaning, as "[t]his Court reviews judgments, not statements in opinions." *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2653 n.5 (1994) (internal quotation omitted). Here, the district court expressly found that "the fundamental factor driving Act 1 was race," and that finding is not clearly erroneous. *Gingles*, 478 U.S. at 79. Based on that finding, the district court was entirely justified in applying strict scrutiny.

II. ACT 1 CANNOT SURVIVE STRICT SCRUTINY.

Strict scrutiny is the most demanding form of judicial review—only state laws "narrowly tailored" to serve a "compelling governmental interest" can survive. *See, e.g.*, *Shaw*, 113 S. Ct. at 2825. "Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact." *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). Louisiana and the United States proffer two "compelling interests" to justify District 4: (1) the need to comply with Sections 2 and 5 of the Voting Rights Act, and (2) the need to "ameliorat[e] the effects of severely racially polarized voting and overcom[e] past discrimination." La. Br. at 38, 32-39; *see also* U.S. Br. at 27-34. Neither of these asserted interests, however, can withstand

even casual scrutiny—which may explain why appellants labor so mightily to avoid strict scrutiny in the first place.[9]

A. A Mistaken Belief That Act 1 Was Compelled By The Voting Rights Act Is Not a Compelling State Interest.

Appellants start, plausibly enough, with the proposition that compliance with federal law qualifies as a compelling state interest for purposes of strict scrutiny. While uncontroversial in the abstract, that proposition is irrelevant in this case. To "comply" with a law is "to act or be in accordance with [the law's] wishes, requests, demands, requirements, conditions, etc." Random House Dictionary of the English Language 419 (2d ed. 1987). As a matter of language and logic, Louisiana has *no* interest—much less a compelling one—in "complying" with requirements of federal law that do not, in fact, exist. A State's interest in complying with a federal law necessarily derives from the federal law itself, and cannot derive from an invalid requirement or a requirement of the State's own imagining. *See, e.g., Shaw*, 113 S. Ct. at 2830 ("States certainly have a very strong interest in complying with federal antidiscrimination laws *that are constitutionally valid as interpreted and as applied*.") (emphasis added); *UJO*, 430 U.S. at 162-163 (plurality opinion) (State has no valid interest in doing more than "the Attorney General was *authorized* to *require* it to do") (emphasis added).

Appellants attempt to sidestep this point by asserting that the relevant question is whether Louisiana *"legitimately believed"* or *"reasonably concluded"* that the Voting Rights Act required the creation of a second majority-minority district, U.S. Br. at 30 (emphasis added)—not whether the Act *actually*

---

[9] Because appellants cannot establish any "compelling interest to justify District 4," there is no way to ascertain whether the district is "narrowly tailored" to serve such an interest. *See, e.g., Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 595 n.15 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989).

required the creation of such a district. *See also* La. Br. at 33 (test is whether State "*reasonably believes* that its failure to take such measures would support a *prima facie* case of a constitutional or statutory violation"). This "legitimate belief" test, appellants contend, is necessary to afford States "a margin of safety that will encourage . . . compliance with the Voting Rights Act." U.S. Br. at 27. *See also* La. Br. at 35 (arguing for "some breathing room for states . . . permitting them to take remedial action without awaiting the final convergence of all facts constituting unassailable proof of a Section 2 violation").

Appellants' "margin of safety" or "breathing room" argument is not without superficial appeal. It is certainly desirable, where possible, to construe federal law to afford some leeway between what one provision requires and what another forbids; a regulated party would face perpetual peril if a mistake with respect to one provision necessarily amounted to a violation of another. Indeed, this Court consistently has adhered to a maxim that creates "breathing room" where a statute arguably requires what the Constitution forbids: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is *plainly contrary* to the intent of Congress." *DeBartolo v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (emphasis added); *see also Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

Appellants, of course, would turn this canon upside down—rather than construing the Voting Rights Act narrowly to avoid a serious constitutional problem, they want to construe the Constitution narrowly to avoid a conflict with their own remarkably expansive interpretation of the statute. In effect, they ask this Court to recognize an unprecedented constitutional defense: state action can not violate the Constitution if based on a "legitimate" or "reasonable"—albeit mistaken—belief about what a federal statute requires. So long

as a State's heart is pure, the argument goes, it cannot deny a citizen equal protection of the laws. Although appellants apparently miss the irony, their argument boils down to the proposition that Louisiana's heartfelt desire to comply with the Voting Rights Act (a statute passed to implement the Constitution's Civil War Amendments) necessarily immunizes the State from alleged violations of those very Amendments.

Our law has never granted States any "good faith" or "breathing room" defense to constitutional violations, and there is no reason to introduce one now. Indeed, no principle is more basic in Anglo-American law than that ignorance of the law is no excuse. *See, e.g., Lambert v. California*, 355 U.S. 225, 228 (1957); *cf.* 1 Wharton's Criminal Law and Procedure § 162; Williams, Criminal Law: The General Part §§ 52-74 (2d ed. 1961); Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 642 (1941). Except in exceptional circumstances, *see, e.g., Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994) (statutory requirement of "wilfulness"); *Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (same), parties are held legally responsible for their conduct *regardless of whether they knew their conduct was unlawful or affirmatively sought to comply with the law. See, e.g., Barlow v. United States*, 32 U.S. (7 Pet.) 404 (1833). A mistaken attempt to comply with the law may absolve a party of *moral* culpability, but it provides no *legal* defense.

This fundamental principle applies to governments as well as individuals. The Court has *never* accepted—nor, as far as appellees are aware, seriously entertained—the proposition that the mere *desire* to comply with a statutory or constitutional provision immunizes state action from constitutional challenge. Where state action is alleged to have violated the Constitution, the question is not whether the State's action was motivated by a desire to violate or comply with the law, but only whether it *actually did so. See, e.g., Widmar v. Vincent*, 454 U.S. at 271 (state interest in avoiding violation of Establishment Clause cannot justify violation of Free Exercise Clause); *see also*

Doe v. Small, 964 F.2d 611, 618 (7th Cir. 1992) (*en banc*) (same); *Cunico v. Pueblo School District*, 917 F.2d 431, 438 (10th Cir. 1990) (school board's desire to comply with federal statute does not justify violation of Fourteenth Amendment, even where school board's interpretation of federal law derived from federal agency).[10] To be sure, individual state actors may be entitled to invoke an immunity defense where they reasonably believed their conduct to be lawful, but that defense does not negate—indeed, it presupposes—the underlying constitutional violation. *See, e.g., Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991); *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985).

Nor does the purity of a State's motives become relevant where, as here, the constitutional provision at issue contains an intent requirement. To establish a violation of the Equal Protection Clause, a plaintiff cannot simply point to state action causing a disparate effect on different racial groups; rather, the plaintiff must either directly or inferentially establish that the action was "motivated by race." *Arlington Heights*, 429 U.S. at 266; *Washington v. Davis*, 426 U.S. at 238-48. As in other areas, however, the relevant intent is not a specific intent to *violate the law*, but a specific intent to *carry out the act in question*. *Cf. United States v. Feola*, 420 U.S. 671, 684-86 (1975); *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563-65 (1971); *Browder v. United States*, 312 U.S. 335, 341 (1941); *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (Hand, J.). State action motivated by race, therefore, is simply not the same as

---

[10] This Court has, of course, held that the exclusionary rule of the Fourth Amendment does not apply where the police carry out a search in good-faith reliance on an invalid warrant. *See United States v. Leon*, 468 U.S. 897, 913 (1984). That holding, however, is based on the proposition that the exclusionary rule is a judge-made prophylaxis not *itself* mandated by the Constitution. This exception, indeed, proves the general rule: if "good faith" negated the underlying Fourth Amendment violation in the first place, the Court would have had no need to devise a "good faith" exception to the exclusionary rule.

state action motivated by a desire to violate the Fourteenth Amendment.

In short, while Louisiana's desire for "breathing room" to comply with the Voting Rights Act is understandable, it is no defense to a constitutional violation. In assessing the validity of Louisiana's asserted "compelling interest" in complying with the Voting Rights Act, the issue is not the reasonableness of the State's asserted "belief" about the Act's requirements, but the Act's requirements themselves.

B. Act 1 Was Not Compelled By the Voting Rights Act.

Even if appellants' "reasonable belief" argument were correct, it would not help them in this case. Under this Court's precedents, the interpretation of the Voting Rights Act now advanced by Louisiana and the Solicitor General can most charitably be described as farfetched. Neither Section 5 nor Section 2 of the Voting Rights Act required Louisiana to create a second majority-minority district on this record.

1. Act 1 Was Not Compelled By Section 5 of the Voting Rights Act.

The requirements of Section 5 of the Voting Rights Act are entirely procedural: before a covered jurisdiction may make a districting change, it must seek either (1) a declaratory judgment from the District Court for the District of Columbia, or (2) preclearance from the Attorney General of the United States. *See* 42 U.S.C. § 1973c (1988). Section 5 thus imposes no substantive requirements—a covered jurisdiction fulfills its statutory obligations by seeking the requisite approval, and may implement its plan absent an objection.

The most obvious flaw in the argument that Section 5 compelled Lousiana to create a second majority-minority district, therefore, is that the State never sought approval of a plan with only one such district from either the Attorney General or the District Court. This case might be different if the federal authorities had compelled Louisiana to create two

majority-black districts, but any compulsion here was entirely self-imposed. *Compare International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 209 (1991) (manufacturer's self-imposed desire to avoid potential state tort liability no defense to violation of federal statute); *and Colorado v. Connelly*, 479 U.S. 157, 165-67 (1986) (self-imposed "compulsion" to confess does not render confession inadmissibly coerced) *with Farmers Educ. & Coop. Union of America v. WDAY, Inc., 360 U.S. 525, 530-35 (1959)* (federal statute *compelling* broadcaster to provide uncensored "equal time" to rival political candidates necessarily immunizes broadcaster from liability under state defamation law).

While the absence of federal compulsion here disposes of appellants' Section 5 argument, even if the Justice Department *had* rejected a plan with only one majority-minority district, Act 1 would remain vulnerable if Louisiana "did more than the Attorney General was authorized to *require* it to do under the nonretrogression principle of *Beer*." *Shaw*, 113 S. Ct. at 2831 (quoting *UJO*, 430 U.S. at 162-163 (plurality opinion)). And even if the Attorney General had interpreted the Voting Rights Act to require a second majority-minority district in Louisiana, that interpretation would not be entitled to deference to the extent it raised serious constitutional problems. *DeBartolo*, 485 U.S. at 575.

Appellants maintain that the absence of federal complusion is immaterial; instead, they effectively insist that Louisiana could have "reasonably predicted" that it would be required to create a second majority-black district. The need to defer to "reasonable predictions" about what the federal authorities might require, we are told, follows from (1) the Attorney General's "primary responsibility" under the Act, (2) the deference owed to "the Attorney General's judgment," and (3) the need to prevent States from "display[ing] the maximum possible defiance of the federal executive branch." U.S. Br. at 31, 33; La. Br. at 37.

Louisiana's "prediction" that a second majority-black district was necessary, in turn, is said to be reasonable in light of three considerations: (1) a 1983 case requiring the State's first majority-minority district in New Orleans, *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1988); (2) the Attorney General's previous objection to the BESE redistricting plan; and (3) the existence of previous Louisiana districts resembling District 4. U.S. Br. at 31; La. Br. at 36-37.

But any such open-ended "prediction" theory truly would give States "*carte blanche* to engage in [the] racial gerrymandering" expressly rejected in *Shaw* (emphasis added). 113 S. Ct. at 2831 (emphasis added). The facts of this case illustrate the absence of any real limits on race-based districting under that approach. *Major v. Treen*, a Section 2 action, required a majority-minority district in New Orleans only *after* a trial at which the three-judge court found that a Section 2 case had been established. 574 F. Supp. at 351. It simply does not follow that Louisiana must create a second majority-minority district somewhere else *without similar proof*. Likewise, the Department's action on the BESE redistricting has no bearing on Act 1: the BESE plan contained eight, not seven, districts, each with a correspondingly lower population (530,000 vs. 600,000), thus making it easier to combine "fragmented minority concentrations" into a second majority district. Finally, the fact that versions of "Old Eighth" district might have had an odd shape in no way gives rise to an inference that any *refusal* to create a new oddly-shaped district is attributable to racial discrimination.

The deference that appellants would afford to a State's "prediction" about the Attorney General's enforcement policy is especially breathtaking when considered in light of the Section 5 review process as it exists today. Since the days of *Allen v. State Bd. of Election*, 393 U.S. 544 (1969), preclearance requests have mushroomed, from 255 in 1970 to

some 23,000 in 1992.[11] The decisive work in most cases is left to junior attorneys, paralegals, and even "by employees without legal training."[12] Not surprisingly, that review process is hardly conducive to "[o]bjection letters [that] cite other objection letters or make any apparent effort to create an independent body of section 5 law based on precedent."[13] Under appellants' approach, the Voting Rights Act would be diverted further off its original course, as it would be driven not only by what zealous enforcers in Washington *actually* do,[14] but by predictions about what zealous enforcers in Washington *might* do.

This Court originally upheld Section 5 as "an uncommon exercise of congressional power" that would not be "otherwise appropriate" absent the exceptional conditions of the time. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Both in *Katzenbach* and subsequently, individual Justices have noted that Section 5's "encroachment on state sovereignty is significant and undeniable," and reiterated the delicate constitutional questions involved. *United States v. Board of Comm'rs*, 435 U.S. 110, 141 (1978) (Stevens, J., joined by Burger, C.J., and Rehnquist, J., dissenting); *Katzenbach*, 383 U.S. at 355 (Black, J., concurring in part and dissenting in part). *Allen*, 393 U.S. at 586 & n.4 (Harlan, J., concurring in part and dissenting in part); *City of Rome v. United States*, 446 U.S. 156, 201-202 (1980) (Powell, J.,

---

[11] Department of Justice, Civil Rights Division, Record of Number of Changes by State and Calendar Year, 1965-1995 (dated Jan. 4, 1995).

[12] Abigail M. Therstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 159 (1987).

[13] *Id.* at 161 (quoting Hiroshi Motomura, *Preclearance under Section Five of the Voting Rights Act*, 61 N.C. L. Rev. 189, 192 (1983)).

[14] It is perhaps a euphemism to call the Justice Department's enforcement of Section 5 "zealous." In *Johnson v. Miller*, 864 F.Supp. at 1368, the district court termed the Department's practices "disturbing," observing that "in a notable faux pas, DOJ's second objection letter arrived at the Office of the Attorney General of Georgia only after members of the Georgia Black Caucus were already discussing it with the press."

dissenting); *id.* at 209-21 (Rehnquist, J., joined by Stewart, J., dissenting); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting); *City of Pleasant Grove v. United States*, 479 U.S. 462, 479 (1987) (Powell, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting); *Holder v. Hall*, 114 S. Ct. 2581, 2611 (Thomas, J., joined by Scalia, J., concurring in judgment). But when *Katzenbach* was decided, surely no one envisioned that State officials would resort to reading "tea leaves" from the Justice Department, or worse still, acting on a nudge and a wink from "middle level bureaucrat[s]" in the Civil Rights Division. *Hays II*, U.S. App. at 7a n.3.

In any event, the district court made findings broad enough to encompass appellants' "reasonable prediction" theory when concluding that Louisiana "did not have *a basis in law or fact to believe* that the Voting Rights Act required the creation of two majority-minority districts." *Hays II*, U.S. App. at 9a (emphasis added).[15] Appellants now accept the court's finding that the failure to create a second such district

---

[15] Had the District Court not rejected the contention that Louisiana reasonably believed that Section 5 compelled its redistricting plan, this case might raise significant questions regarding the entire Section 5 enforcement scheme. Examples include: (1) the statutory basis, if any, for the Justice Department's claimed authority to enforce Section 2 via Section 5 preclearance, *see, e.g., New York v. United States*, No. 94-2219, 1994 WL 744179 (D. D.C. 1994); (2) the validity of the Department's policy requiring States to "maximize" the number of majority-miority districts in order to avoid a finding of discriminatory purpose, notwithstanding *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2660 (1994); *Beer v. United States*, 425 U.S. 130 (1976); (3) the appropriate deference, if any, due the Department's substantive interpretations of Section 5 in light of its enforcement role and Congress' primary delegation of decisional authority to the D.C. District Court, *see e.g., Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., joined by O'Connor, J., and Kennedy, J., concurring in the judgment); and (4) the Department's authority to override state redistricting plans beyond the extent necessary to remedy violation of the Civil War Amendments. *See City of Rome*, 446 U.S. at 209-221 (Rehnquist, J., dissenting).

would *not* result in "a retrogression of minority [voting] strength." *Id.* at 8a (emphasis added). And even, applying an unduly generous test comprehending the State's *beliefs*, the court below found that "[n]either the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would . . . have an illegal purpose or effect." *Id.* Because the court applied the legal test appellants now advocate, there is no basis to disturb its conclusion. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990).

2. Act 1 Was Not Compelled By Section 2 of the Voting Rights Act.

The framework for deciding whether a redistricting plan is compelled by Section 2 of the Voting Rights Act is not in dispute. The "Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 113 S. Ct. 1075, 1081 (1993). Because States' redistricting authority does not flow from the Voting Rights Act, "[f]ederal courts are barred from intervening in state apportionment in the absence of a violation of federal law." *Voinovich*, 113 S. Ct. at 1156. The principal sources of federal limitations on state redistricting authority, then, are the Fourteenth and Fifteenth Amendments *see, e.g., Voinovich*, 113 S. Ct. at 1157, 1159—although, as noted above, States certainly have "a very strong interest" in complying with the Voting Rights Act to the extent its provisions *"are constitutionally valid as interpreted and as applied."* *Shaw*, 113 S. Ct. at 2830 (emphasis added).

This Court first addressed the need to balance state sovereignty against federal limitations in the redistricting context in *UJO*. There, even though New York "adhered to traditional districting principles," *Shaw* 113 S. Ct. at 2829, it mustered the votes of only three Justices when it "deliberately used race in a purposeful manner." *UJO*, 430 U.S. at 165. Justice Brennan's concurring opinion eloquently expresses the concerns arising from a State "policy of benign racial sorting":

it may (1) "disguise . . . illicit objectives" and "frustrate successful efforts at coalition building across racial lines"; (2) "stimulate our society's latent race consciousness" and "stigmatize recipient groups"; and (3) "[b]e viewed as unjust . . . especially by thse individuals who are adversely affected." *Id.* at 172-175. Just as eloquently, this Court reaffirmed Justice Brennan's concerns in *Shaw*: racial gerrymandering "reinforces racial sterotypes and threatens to undermine our system of representative democracy by signalling to elected officials that they represent a particular racial group rather than their constituency as a whole." 113 S. Ct. at 2827.

The Solicitor General would brush these concerns aside and allow a State to engage in explicitly race-conscious redistricting whenever it "legitimately believes that each of the three *Gingles* preconditions could be established against it and when, without [creating a new majority-minority] district, the minority group remains substantially underrepresented when compared to the group's proportion of the population." U.S. Br. at 28-29. Appellants thus dilute a "strong basis in evidence" down to a "sound basis for believing." *Id.* at 22 (citing *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986) (plurality opinion) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (O'Connor, J., concurring in the judgment). Then, they baldly assert that "overwhelming evidence" establishes that blacks in Louisiana are politically cohesive and the State's whites usually vote as a bloc; appellants pause only on "the question whether the minority population is sufficiently large and compact"—an issue on which they argue the adverse finding below was "erroneous." U.S. Br. at 29; La. Br. at 33-34.

Once again, appellants conflate what Louisiana allegedly "believed" the Voting Rights Act to require and what the Act actually *does* require. *See* pp. 35-38, *supra*. While it is true that "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a

constitutional prerequisite," that in no way excuses a State from providing "statistical proof" and eventually providing the necessary "evidence of its remedial purpose." *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in judgment).[16] "[S]imple legislative assurances of good intentions cannot suffice"; rather, the State must provide "a strong basis in evidence for its conclusion that remedial action was *necessary*." *Croson*, 488 U.S. at 510 (plurality opinion) (emphasis added).

Louisiana has simply failed to provide the requisite "strong basis in evidence" to justify "remedial action" as "necessary" under Section 2 of the Voting Rights Act. The district court found that "[t]he evidence convincingly proves that the State cannot clear the first *Gingles* hurdle," compactness. U.S. App. at 8a. There is no dispute that "compactness" under *Gingles* is a question of *fact*. *See Gingles*, 478 U.S. at 77-79; *Westwego Citizens for Better Gov't v. Westwego*, 906 F.2d 1042, 1046-47 (5th Cir. 1990) ("The appropriate method of establishing the first *Gingles* factor is a 'matter of fact'"). Moreover, in contrast to other cases, Louisiana here offered *no statistical evidence whatsoever* to show that District 4 was compact. *See Johnson v. Miller*, 864 F. Supp. at 1388 (statistical data offered by Georgia); *Vera v. Richards*, 861 F. Supp. at 1328 (statistical data offered by plaintiffs).[17]

---

[16] The court below did not hold that "there *must* be 'findings of . . . statutory violations.'" U.S. Br. 27 (emphasis added). Instead, it held that the State must "'demonstrate a strong basis in evidence for its conclusion that remedial action was necessary.' Such a basis *may be drawn* from judicial, legislative, or administrative findings of constitutional or statutory violations." *Hays II*, U.S. App. 7a (citation to *Croson* omitted) (emphasis added).

[17] The omission of statistical data is striking since compactness, whether measured by either or both of two statistical techniques, showed District 4 in Act 42 to be one of the *least* compact districts in the Nation. *See* Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts,"*

(continued...)

Appellants instead rely almost exclusively on the opinion of "the state's demographer, Glenn Koepp, [who] testified that District 4 *is* reasonably compact." La. Br. at 34.[18] His testimony, however, only underscores the weakness of appellants' Section 2 claim: "I truly believe that this is the most compact—the Fourth District in this plan is the most compact second minority district in the state that *has 55 percent registered to vote minority*." J.A. 125. (emphasis added). The following exchange ensued:

> JUDGE WALTER: Why is it reasonably compact? I mean it's obviously not compact. Now how is it reasonably compact?
>
> THE WITNESS: Your Honor, my opinion of that, and I think it's even in the decision by the Supreme Court, compactness is in the eye of the beholder. You know it when you see it.
>
> JUDGE WALTER: It's not compact to the eye of this beholder.

J.A. 127. The district court did not clearly err in finding that this and similar evidence "confirmed that Louisiana's minority poulation is simply not sufficiently concentrated to meet

---

[17] (...continued)
and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 Mich. L. Rev. 483, 553-575 (1993). If District 4 in Act 1 were really more compact than its counterpart in Act 42, Louisiana presumably would have presented statistical evidence to prove the point.

[18] Koepp, an assistant secretary of the Louisiana Senate and the official responsible for drawing Act 1's boundaries, did not testify as an expert at trial. The court's reference to "the State's own expert" presumably means the State's expert geographer, Dr. Hilliard, who introduced data and maps on Louisiana congressional districts since 1912. These data confirm that Act 1's District 4 is not compact since it spans a greater distance than any congressional district in Louisiana history. Castille & Hilliard Decl., USX 8, Table 1.

Gingles minimum requirements." *Hays II*, U.S. App. at 8a n.4.[19]

Appellants also err in claiming that the evidence on bloc voting "leav[es] no doubt whatsoever concerning the other two *Gingles* factors." La. Br. at 35; U.S. Br. at 29. But the law is well-established that neither the parties nor the court "may . . . presume bloc voting." *Growe*, 113 S. Ct. at 1085. Because appellants failed to clear *Gingles'* first hurdle, *Hays II* made no conclusive findings regarding either black political cohesion or white bloc voting. In considering Act 42, however, *Hays I* found that "the evidence supported an average, *net* white cross-over vote in non-judicial elections of between 10% and 25%." *Hays I*, U.S. App. at 83a-84a.

Appellants ignore this factual finding entirely, preferring to rely instead on evidence from an expert (Engstrom) whose testimony the *Hays I* court expressly rejected. La. Br. at 30-31; U.S. Br. at 29. Engstrom's presentation on bloc voting dealt only with elections in which a black candidate opposed a white candidate. Engstrom Declaration, J.A. 181-93. The Voting Rights Act, of course, protects minority-*preferred* candidates, not minority-*race* candidates. *Gingles*, 478 U.S. at 68 ("[I]t is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important.")

---

[19] The court also expressly relied on the United States' Exhibit 2. *Id.* That Exhibit, a schematic map of Louisiana with an overlay of District 4, demonstrates that District 4's black population resides overwhelmingly in four widely-separated cities, anchored by Shreveport and Baton Rouge at the District's north and south ends respectively. On closely similar facts, the district court in *Johnson v. Miller*, 864 F.S upp. at 1389, found that "[t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties . . ." There, as here, "DOJ's insistence that they are 'compact' renders the term meaningless." *Id.* Ultimately, appellants claim only that District 4 is "not materially stranger in shape" than other districts elsewhere—but that is hardly the test announced in *Gingles*. La. Br. at 35.

(plurality opinion). The district court, therefore, was free to credit the testimony of plaintiffs' expert, Dr. Ronald Weber, who presented a far broader range of data, including the results of dozens of single and mixed-race elections for the Louisiana House and Senate, as well as recent races for Governor and United States Senator in which the black-preferred candidate was elected. PX 8.

C. Act 1 Cannot Be Justified By A Perceived Need To Remedy Historical Inequity.

Appellants ultimately deploy their most sweeping justification for District 4: "Louisiana's history of racial discrimination and the patterns of racially polarized voting" independently warrant a second majority-minority district. La. Br. at 38; U.S. at 34. It is elementary, however, that a State cannot insulate discriminatory action from review simply "by conceding that [it] discriminated in the past, now that it is in [its] interest to make such a concession." *Wygant*, 476 U.S. at 278 n.5 (plurality opinion). And as for racially-polarized voting, not only was there no finding below, but there was no reason to reach the issue in light of the court's dispositive finding that Act 1 failed *Gingles'* first precondition. *See* pp. 46-47, *supra*. Moreover, the district court flatly rejected the suggestion that there was any "concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures." *Hays II*, U.S. App. at 10a.

Even if this factual finding were erroneous, appellants' invocation of past discrimination to justify present discrimination would still fail as a mater of law. Appellants seize upon an apparently approving reference in the *UJO* plurality opinion to a potential remedy that would assure the "fair allocation of political power between white and nonwhite voters." 430 U.S. at 167 (plurality opinon). The Solicitor General claims that "[n]o other Justices in *UJO* addressed that issue." U.S. Br. at 34. But as this Court noted in *Shaw*, Justice Brennan did indeed address the point by rejecting "benign

racial sorting" for the reasons noted previously. *See* p. 44, *supra*. Subsequent decisions, moreover, have condemned racial *group* remedies under the Voting Rights Act except where a minority is "essentially shut out of the political process." *Davis* v. *Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). And far from creating remedies beyond the Act, recent decisions hold that a Section 2 claim may not exist even where all three *Gingles* criteria are satisfied. *DeGrandy*, 114 S. Ct. at 2663; *Nipper v. Smith*, 39 F.3d 1494, 1512 (11th Cir. 1994) *(en banc)*. By contrast, appellants' expansive additional remedy would make *Gingles'* requirements superfluous.

These precedents are enough to reject appellants' "fair allocation" argument without reaching the more far-reaching issues it might present.[20] Any remedy that portends a "fair allocation of political power between white and nonwhite voters," *UJO*, 430 U.S. at 167 (plurality opinion), would involve courts even more deeply than now in deciding which racial classifications are "benign" and which are not. *See Shaw*, 113 S. Ct. at 2834; *Metro Broadcasting*, 497 U.S. at 609 (O'Connor, J., dissenting). Judicial scrutiny of that sort is at best a hazardous undertaking that would return this Court to the days of *Plessy*—albeit characterizing the inquiry not as "separate but equal" but instead "unequal but benign," *id.* at 638 (Kennedy, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

---

[20] Some have suggested, for example, that "[A] constitutional rule capable of constraining political results, not merely subjecting them to judicial oversight, must either require the government to classify its citizens by race or else forbid the practice: there is no middle ground." A. Kull, *The Color-Blind Constitution* 223 (1992).

Respectfully submitted,

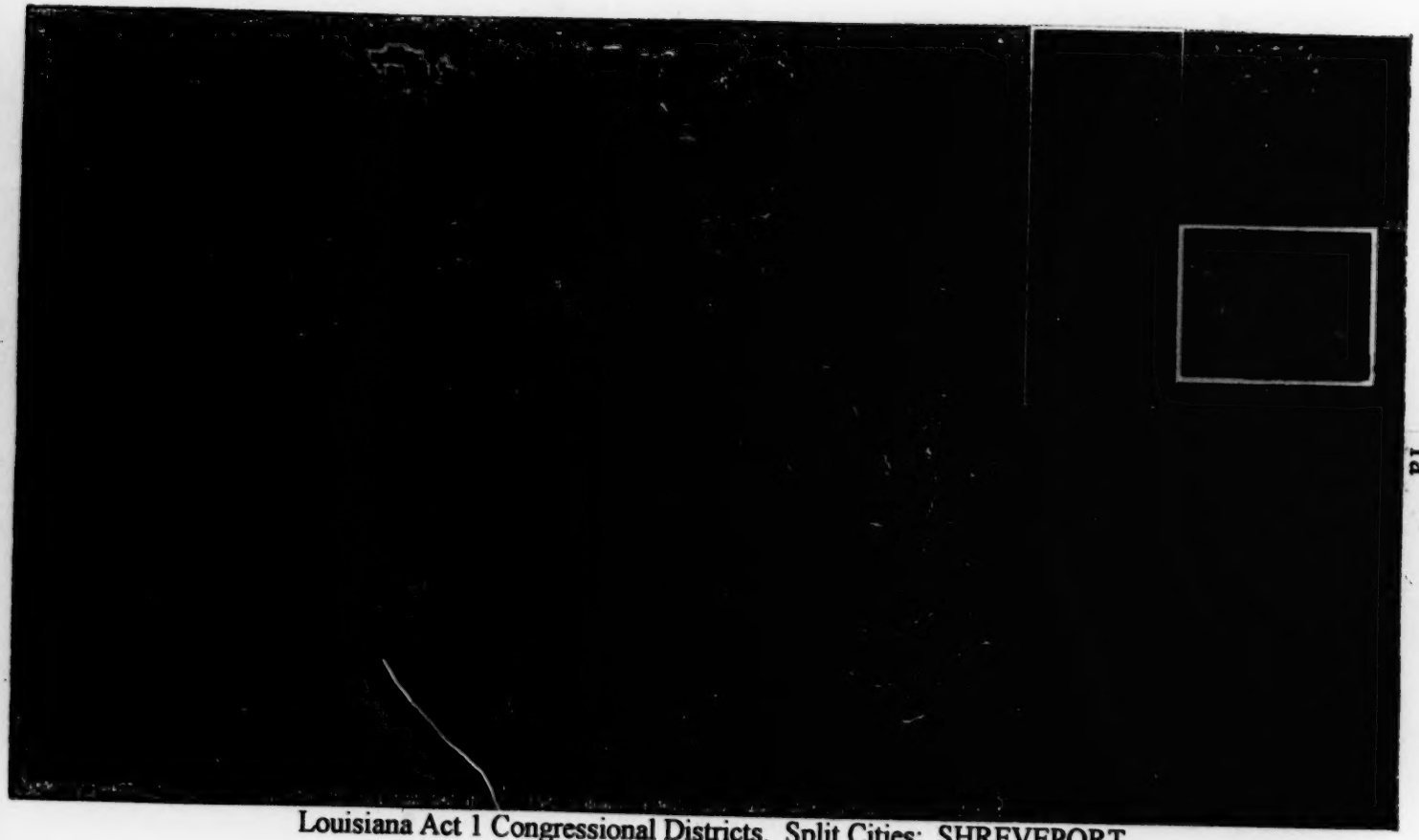
EDWARD W. WARREN
Counsel of Record
CHRISTOPHER LANDAU
JAY P. LEFKOWITZ
ROBERT R. GASAWAY
GERALD F. MASOUDI
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

Counsel for Appellees

Dated: March 15, 1995

APPENDIX

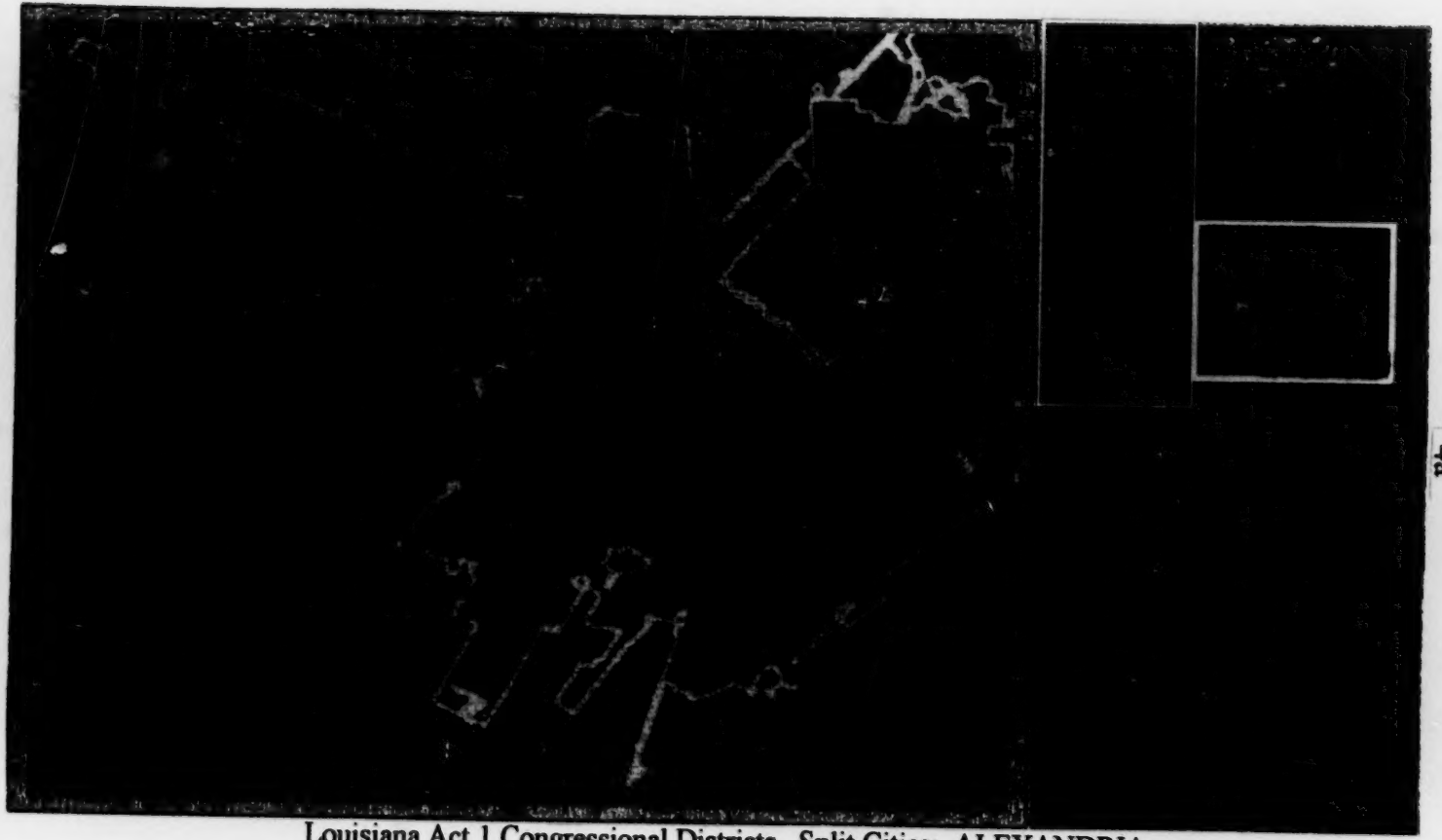
BEST AVAILABLE COPY



Louisiana Act 1 Congressional Districts. Split Cities: SHREVEPORT

Louisiana Act 1 Congressional Districts. Split Cities: LAFAYETTE

Louisiana Act 1 Congressional Districts. Split Cities: BATON ROUGE



Louisiana Act 1 Congressional Districts. Split Cities: ALEXANDRIA